



Association of Personal Injury Lawyers (APIL)

Briefing: Damages (Return on Investment) Bill – March 2021

Purpose of the discount rate

The Damages (Return on Investment) Bill will put into a law a new legal framework for setting the personal injury discount rate in Northern Ireland.

The purpose of the discount rate is to ensure that compensation does what it is required to do: return the injured person to the position in which he would have been, if it were not for the injury. No more, no less. In the kind of catastrophic injuries where the discount rate applies, injured people can face substantial financial losses: loss of earnings if they cannot work again, for example; the cost of round-the-clock medical care, and social care and support. They may need professional help with washing, dressing, getting up and about, getting proper exercise, social activities, or they may need to have meals made for them. This is in addition to the need for specialist equipment to help them manage their disabilities, such as wheelchairs and hoists.

It is important to recognise that the people who are affected are those who have sustained catastrophic, life-changing injuries at the hands of other people – and that those responsible have been proven to have caused needless, avoidable harm. If an injured person is given a lump sum payment, he is expected to invest that sum to ensure it lasts for the rest of his life. The lump sum compensation is reduced ('discounted') to reflect the rate of return on such investments, to ensure the injured person does not make a profit from his compensation.

Setting the discount rate

The first thought of someone who receives compensation following a catastrophic, life-changing injury is "how can I eke out my compensation payment to make sure it lasts long enough to look after me and my family for the rest of my life?" or "will my compensation payment keep pace with inflation in the long term". It is not "how can I make the most of this fantastic windfall?". Injured people are not stockbrokers, and this is recognised by the current method for setting the discount rate, as set out in *Wells v Wells* [1999] 1 AC 345.

Under the current method, injured people are assumed to be very risk averse “or risk free” investors. This method for setting the discount rate should not change. It is the best hope injured people have of obtaining full compensation for their catastrophic injuries.

Injured people are right to be risk averse. The compensation they are given is all they will ever have. Many survive – rather than actually live – in fear of what will happen if the money runs out. Damages must, therefore, be calculated on the assumption of risk-free investments, as recognised in the current calculation, and the rate should be reviewed on a regular basis. This is an issue of need: the actual concrete needs of people who have been injured through negligence must be met in a fair and just 21st century society.

The current discount rate

Since 2001, the discount rate in Northern Ireland has been set at 2.5 per cent, but it became apparent by 2010 that the rate was no longer appropriate because of changes in the markets which have affected the rate of return on investments. At that point, APIL began to campaign for changes in the rate across the UK. Eventually, in 2017, the rates were changed in England/Wales and Scotland, with changes also made to how the discount rate is set in those jurisdictions. Injured people in Northern Ireland, however, have remained subject to a discount rate which the rest of the UK deems inappropriate.

This legislation does not abnegate the Department of Justice (DoJ) of its responsibility to injured people of taking immediate action to correct the discount rate, and this is the subject of a separate application for judicial review. The DoJ should, under the current law, set an interim discount rate now to ensure that while this legislation is debated, injured people in Northern Ireland will no longer face the prospect of being undercompensated by the inappropriate 2.5 per cent discount rate.

The example below was provided by a law firm following the change in the discount rate in England/Wales in 2017 from 2.5 per cent to -0.75 per cent. It highlights the importance of an appropriate discount rate:

“William, a 30 year old claimant, suffered a life-changing injury in a road traffic accident. He is likely to require daytime and night-time care. He will have equipment costs and increased care needs for the rest of his life. He can no longer work and his plans for the future are destroyed as a result of his injuries. The costs of his care total £100,000 a year.

- Under the old rate of 2.5%, William would receive a lump sum award of approximately £5-6 million.
- Under the new rate of -0.75%, William would receive a lump sum award of approximately £9 million.

The increase in the award could therefore be up to 60% as a result of the change to the discount rate.”¹

Those people who are undercompensated by an inappropriate discount rate are forced, unfairly, to try to eke out their compensation as much as they can to make sure it can last them for the rest of their lives. If the money runs out, they are forced to turn to the State for support, rather than the person who caused the needless harm, leaving the taxpayer to meet the cost of someone else’s negligence. We have also heard from our members that injured people have often been so concerned about running out of money, they have gone without the therapies they desperately need, or relied on the charity of their families.

A new framework

For all these reasons, the framework for setting the discount rate in Northern Ireland should not change from the current *Wells v Wells* calculation.

The DoJ has, however, made it clear that it intends to adopt the model which is used currently in Scotland. Last year, the DoJ consulted on whether it should adopt the system in Scotland, the system in England/Wales, or create a third framework. It is our view that creating a third framework is unnecessary, and while neither system is perfect, there are aspects of the Scottish system which make it preferable to the system which has been implemented in England and Wales.

Setting the discount rate should not be a political decision, and we support the approach of the DoJ to remove the possibility of political influence. Unlike in England and Wales, where the Lord Chancellor retains the final decision for setting the rate, this Bill will ensure that setting the rate in Northern Ireland is an actuarial task, and not a political one. There is no legitimate reason or necessity for political involvement.

¹ <https://www.blasermills.co.uk/insights/article/concession-for-claimants-the-impact-of-discount-rate-changes-on-personal-injury-claims/>

The legislation also brings transparency to the process, with the decision to include in the Bill the formula which will be used for calculating the rate. This will ensure all parties know exactly how the discount rate was decided, and could even help predict what a new rate could be ahead of a review.

We also support the decision not to include the investment behaviour of injured people in setting the rate. Any analysis of claimant investment behaviour carried out under the current 2.5 per cent discount rate will be highly misleading, as many people subject to this discount rate feel forced to make higher-risk investments to make ends meet.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,200 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

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